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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 LARRY LLOYD,

9 Plaintiff,

10 v.

11 CHIEF MICHAEL POWELL, et al.,

12 Defendants.

Case No. C09-5734BHS

ORDER OVERRULING
PLAINTIFF'S OBJECTIONS AND
ADOPTING REPORT AND
RECOMMENDATION

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14 This matter comes before the Court on the Report and Recommendation ("R&R") of
15 the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 124), Plaintiff's
16 ("Lloyd") objections to the R&R (Dkt. 139), Lloyd's motion for leave to file excess pages
17 (Dkt. 143), and Defendants'¹ ("Forks City Defendants") motion to strike (Dkt. 142). For the
18 reasons discussed herein, the Court overrules Lloyd's objections, adopts the R&R, grants
19 Plaintiff's motion to file excess pages, and grants in part and denies in part Defendants'
20 motion to strike.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 This matter arises out of Lloyd's challenge to medical treatment that he received in
23 response to his complaints of food poisoning, which he made while serving time as an
24 inmate of the Forks, Washington City Jail. The magistrate judge summarized the case
25 accurately as follows:

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27 ¹Dr. Bokari has already been dismissed from this action. Dkt. 75. The Court will refer to the
28 remaining Defendants as "Forks City Defendants" to mirror the R&R.

1 Plaintiff Larry Lloyd claims that he contracted food poisoning from a
2 “T.V. Style Dinner” served to him at the Forks City Jail on November 15,
3 2008. He was taken to the Forks Community Hospital where he was treated,
4 kept for observation, and discharged the next day after his symptoms improved
5 and test results indicated no cause for further hospitalization. Mr. Lloyd filed
6 suit against Mike Powell, Chief of Police for the City of Forks Police
Department; Ed Klahn, a Sergeant for the City of Forks Police Department;
and, Lex Prose, a correctional officer at the City of Forks Jail (“Forks City
Defendants”). He also sued Dr. Freeha F. Bokhari, the treating emergency
room physician at the Forks General Hospital. His claims against Dr. Bokhari
have been dismissed with prejudice. [Dkt. 75.2]

7 The claims against the Forks City Defendants include that (1)
8 Defendant Prose forced Mr. Lloyd to leave the hospital before Dr. Bokhari had
9 completed his medical tests, kept him from seeking a scheduled follow-up, and
10 refused him the “right to seek any form of medication if needed”; (2) Forks
11 City Defendants Powell and Klahn ignored his pain; (3) he was placed in
segregation for “at best ten days” for filing a grievance; and, (4) Forks City
Defendants transferred him to the Kitsap County Jail where he could be better
monitored in retaliation for his medical complaints and grievances. Mr. Lloyd
claims that he now suffers from kidney damage and “gastroentero reflex”
because Sergeant Klahn failed to provide him with nutritionally adequate food.

12 Mr. Lloyd asks that the Forks City Defendants be ordered to desist in
13 serving spoiled food, from interfering with the orders of medical personnel,
and help pay for a new kidney in the future in the event his “other” kidney
fails him.

14 Dkt. 124 at 1-2.

15 On November 8, 2010, the magistrate judge recommended granting Forks City
16 Defendants’ motion for summary judgment because Lloyd failed to establish a violation of
17 his constitutional rights under 42 U.S.C. § 1983. On January 20, 2011, Lloyd objected to the
18 R&R. Dkt. 139. On February 3, 2011, Forks City Defendants responded in opposition to
19 Lloyd’s objections. Dkt. 142. Lloyd did not reply.

20 Within their response, Forks City Defendants moved to strike Lloyd’s excess pages
21 and to strike certain statements and exhibits that rely on alleged facts not previously
22 introduced into the record until Lloyd filed his objections to the R&R. *See* Dkt. 142. In
23 response, Lloyd filed a motion for leave to file excess pages. Dkt. 143.

II. DISCUSSION

A. Lloyd's Motion for Leave to File Excess Pages

Lloyd's motion for leave to file excess pages is granted in consideration of his *pro se* status. Therefore, Forks City Defendants' motion to strike Lloyd's excess pages is denied.

B. Defendants' Motion to strike Exhibits and Allegations

Forks City Defendants move to strike Lloyd's Exhibits B, D, and E to his declaration. Dkt. 140. Forks City Defendants also move to strike certain allegations within Lloyd's objections. *See* Dkt. 142 at 2 (setting out allegations to be stricken). Forks City Defendants further move to strike Lloyd's allegations that he suffered "toxic poisoning" to his kidney and that he suffered from a "serious medical condition." *Id.* at 2.

The Court having reviewed the record and the motion to strike agrees that these exhibits and particular allegations are to be stricken, as they were not previously part of the record.

The Court, however, denies as moot the motion to strike regarding "toxic poisoning" and because the Court already ruled in favor of Forks City Defendants on this issue. *See* Dkt. 45 at 8. As for the motion to strike allegations of a "serious medical condition," the magistrate judge correctly noted that such is a matter of proof and not pleading and, therefore, the motion to strike on this issue is denied.

C. Lloyd's Objections to the R&R

1. Eighth Amendment

Lloyd alleged a violation of his constitutional rights under the Eighth Amendment – denial of medical care and deliberate indifference. To sustain such a cause of action, Lloyd must show (1) that he suffered a violation of rights protected by the Constitution or created by federal statute, and (2) that the violation was proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

Aside from raising arguments that were properly rejected by this Court in prior orders or by the magistrate judge in her R&R, Lloyd has still presented no evidence that any act or

omission by the Forks City Defendants violated his constitutional rights. Further, Lloyd has not adequately supported any claim that the magistrate judge erred in recommending that the Forks City Defendants' motion for summary judgment be granted on this Eighth Amendment Issue.

Therefore, the Court adopts the R&R on this issue.

2. First Amendment

Lloyd alleges that he was placed in segregation to "chill" his grievances and that the Forks City Defendants transferred him to the Kitsap County Jail out of retaliation for his grievances. To succeed on this First Amendment claim, Lloyd must show that (1) he was engaged in a constitutionally protected activity; (2) Forks City Defendants' adverse action caused Lloyd to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) the adverse action was motivated at least in part as a response to the exercise of Lloyd's constitutional rights. *See Mendocino Envtl. Center v. Mendocino Cnty.*, 192 F.3d 1283, 1300-01 (9th Cir. 1999).

Aside from raising arguments that were properly rejected by this Court in prior orders or by the magistrate judge in her R&R, Lloyd has still presented no evidence that his placement in segregation or his transfer were motivated, at least in part, in response to the exercise of his right to file grievances. Lloyd has also failed to make any showing other than timing, which alone is insufficient, to support his claim of retaliation (i.e., that he exercised his right and then he was transferred). Indeed, evidence was adduced before and correctly relied upon by the magistrate judge that established disciplinary reasons for the transfer.

In short, Lloyd has not adequately supported any claim that the magistrate judge erred in recommending that the Forks City Defendants' motion for summary judgment be granted on this First Amendment issue.

Therefore, the Court adopts the R&R on this issue.


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III. ORDER

The Court having considered the R&R, Plaintiff's objections, and the remaining record, does hereby find and order as follows:

- (1) Lloyd's objections are **OVERRULED**;
- (2) Lloyd's motion to file excess pages is **GRANTED**;
- (3) The Forks City Defendant's motion to strike is **GRANTED in part and DENIED in part** as discussed herein;
- (4) The R&R is **ADOPTED**;
- (5) The Court **GRANTS** the Forks City Defendants motion for summary judgment and Lloyd's claims against them are **DISMISSED with prejudice**.

DATED this 7th day of March, 2011.


BENJAMIN H. SETTLE
United States District Judge